Before the

SUBCOMMITTEE ON COAST GUARD AND MARITIME TRANSPORTATION

Hearing on

FEDERAL MARITIME COMMISSION MANAGEMENT

and

REGULATION OF INTERNATIONAL SHIPPING

JUNE 19, 2008

Testimony of

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1 INTRODUCTION

Mr. Chairman and distinguished members of the Subcommittee, I want to thank you for inviting me to testify on this important issue of the Federal Maritime Commission Management and Regulation of International Shipping. My name is Win Froelich, and I am the general counsel to the National Association of Waterfront Employers (NAWE).

NAWE is a not-for-profit trade association organized under section 501(c)(6) of the tax code. NAWE represents the United States private sector marine terminal operators (MTOs) and stevedores. NAWE member companies load and unload vessels at the vast majority of the general cargo and container terminals along the Great Lakes, East Coast, Gulf Coast, West Coast, Alaska, Hawaii, and the territories and commonwealths of the United States.

The ports of the United States handle approximately 15% of the U.S. Gross Domestic Product (GDP), and NAWE member companies handle the majority of this cargo. The national and world economies are dependent upon the efficient flow of commerce through NAWE member facilities.

My objective today with this written testimony is to provide the Subcommittee with background on the legal and factual structure of the U.S. maritime industry. I believe that it is important for the Committee to understand three facts:

1. The United States is a maritime nation dependent upon maritime commerce for survival.
2. The U.S. Constitution assigns responsibility for regulating the maritime commerce to the federal government exclusively, and removes regulatory power from states and local authorities.
3. Private sector marine terminal operators are increasingly being called upon to help solve public policy problems—congestion, pollution, security, safety—that will be difficult to solve without the antitrust immunity provided in federal law.

Let me address each of these points in order.

2 MARITIME COMMERCE

The United States is dependent upon maritime commerce for its survival. The starting point of this discussion should be geography. The United States has land connections with only two countries—Canada and Mexico—and has no direct land connections with Alaska, Hawaii, Puerto Rico and the territories. Furthermore, most of the states have no direct coastal outlet to world maritime commerce. Instead, most states are dependent on the ports in their sister states for access to world markets.

The U.S. is the world's principal maritime country with 20% of the world's maritime volume coming either to or from the U.S. Roughly 15% of the U.S. GDP—approximately $2.5 trillion in commerce—flows into or out of our ports. The 15% of commerce that flows through our ports only scratches the surface of the impact maritime commerce has on the U.S. economy. For each ton of maritime commerce that flows through the ports, scores of U.S. jobs are created in every sector of the economy: jobs that are dependent on imports and exports. I believe, but cannot point to a study to substantiate it, that more than half of the U.S. GDP is directly or indirectly dependent upon maritime commerce.

Much of this commerce now moves through containers. In 2006, U.S. maritime commerce required more than 27 million TEU containers. Cargo volume has grown 10% annually for most of the recent past, and there is no reason to believe that there will not be significant growth well into the future.

Fortunately, the U.S. has significant natural and man-made resources available to it to handle this maritime commerce. The U.S. has 25,000 miles of waterways and 1,000 harbor channels that contain more than 350 ports with more than 3,700 marine terminals. These marine terminals handle more than 65,000 port calls of vessels over 10,000 DTW (2006) and 110,000 commercial and recreational fishing vessels. One hundred thirty million passengers move by ferry each year, and there are more than five million cruise ship passengers.

While the U.S. has natural and man-made maritime resources, increasingly, the flow of maritime commerce is concentrated in a few "super ports." LA/Long Beach and New York/New Jersey are at the top of the list. Of the 27 million TEU containers that entered the U.S. in 2006, 14 million TEUs, or slightly over half, went through these two ports. More importantly, from an economic standpoint, the most valuable commerce tends to flow through these two ports. If you measure cargo by value instead of volume, roughly 5% of the GDP flows through LA/Long Beach and roughly 5% flows through New York/New Jersey. The remaining 5% flows through all the rest of the U.S. ports.

Most of the cargo flowing through a port—usually well over 66%—is going to or coming from states other than a port state. As mentioned earlier, most states today have no direct coastal outlet to the world's markets.

Let me give you a practical example of how this maritime commerce system works. On Friday, a 6,000 TEU vessel containing approximately $5 billion of commerce—food, clothing, auto parts, furniture and other essential goods—will arrive in LA/Long Beach. That vessel represents just 6,000 of the approximately 30 million TEU that will be transported this year.

That ship will be unloaded over the weekend, and by Monday the offloaded cargo will be enroute to various distribution centers across the nation. It takes approximately 60 trains each and every day, each train more than a mile long, plus tens of thousands of trucks to move cargo to and from LA/Long Beach. By the following Wednesday, that ship will be reloaded with billions of dollars of US exports and on its way to foreign ports.

Within one week, the cargo from that ship arriving Friday will be in the distribution centers of this nation. Within two weeks, the cargo will be on retail store shelves and in factories. The food, clothing, and other goods will be on our retail shelves in large and small towns across the country. The auto parts will be going into cars in assembly plants in Michigan, Tennessee, Alabama and other states. Some of the cargo arriving Friday will already have been sold two weeks from now, and the export goods that were loaded on that ship will have been unloaded in some distant port.

This is the modern just-in-time delivery system that is now the basis of the entire U.S. and world economy. The ships and marine terminals of today are the warehouses of yesterday. When the flow of maritime commerce stops, the U.S. and world economies stop. U.S. factories close and grocery shelves and retail stores start to empty within weeks of a disruption in the flow of maritime commerce.

Any disruption in the maritime commerce system has an immediate and measurable impact on the economy. The Nation saw this during the short lockout on the West Coast several years ago. The Nation had months of advance notice that a strike or lockout might occur. Many businesses tried to stockpile critical parts and supplies in anticipation of such a strike or lockout. Nonetheless, within a week of the lockout, plants started to close and goods started to disappear from store shelves.

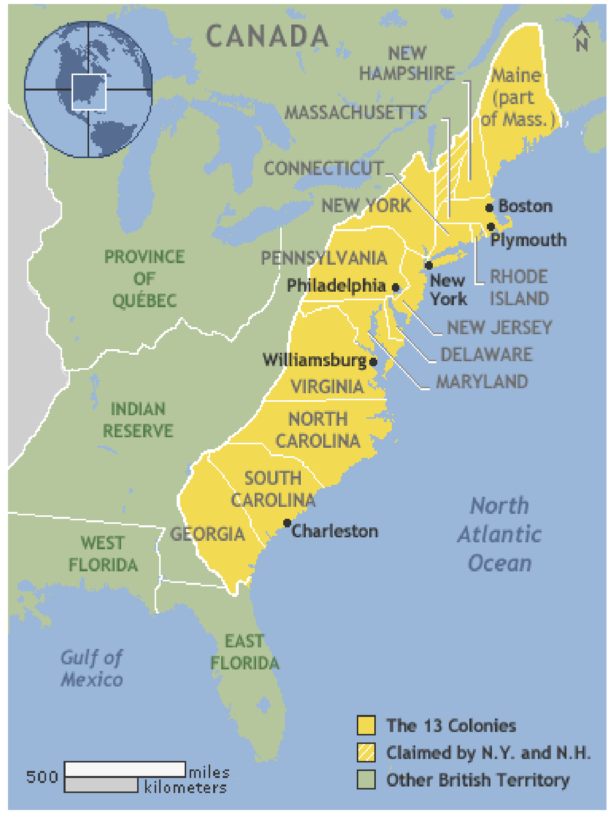
Furthermore, it takes a long time to recover from any disruption in the maritime commerce system. The Department of Transportation estimates that recovery from a one-day disruption takes one month. Recovery from a week-long disruption takes six months.

The maritime commerce system has to work, and it has to work smoothly. As the Committee considers changes to the Nation's laws governing maritime commerce, NAWE looks forward to working with the Committee to make sure that changes improve the reliability and efficiency of the system.

3 FEDERAL RESPONSIBILITY

The above example brings me to my second point which is that the regulation of maritime commerce is exclusively a federal responsibility. Let me again start with geography. The map below is of the thirteen original colonies at about the time the Constitution was adopted.

From its inception, the United States was a maritime nation. Most of the commerce with the world, and between the states, flowed over the navigable waters. Each of the original colonies had direct outlets to the sea to facilitate this commerce. The borders of the original colonies were frequently the major rivers and harbors of the Nation. Not surprisingly, the ports of the Nation were located on these harbors and rivers, and the major population centers were these port cities.



This geography placed each of the original thirteen colonies in a position to interfere with the maritime commerce of the other colonies; and interfere they did. Each of the original thirteen colonies attempted to negotiate its own deals and make its own laws concerning maritime commerce. Virginia for example attempted to require all vessels destined for the Port of Baltimore to first make a port call in Norfolk.

This lack of uniformity and constant interference between the colonies led to the Virginia Resolution on January 21, 1786:

> *Resolved*, That Edmund Randolph, James Madison, jun. Walter Jones, Saint George Tucker and Meriwether Smith, Esquires, be appointed commissioners, who, or any three of whom, shall meet such commissioners as may be appointed by the other States in the Union, at a time and place to be agreed on, to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States, such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same.

The Virginia Resolution called for a meeting of the colonies. The meeting had one purpose, to centralize the control of maritime commerce. The Virginia Resolution led to the Annapolis Convention in September 1786. The Annapolis Convention led to the Philadelphia Convention in May 1787 where our Constitution was written. The Constitution was then ratified in September 1787.

The Constitution reflects the concern over federal regulation of maritime commerce. The Constitution is full of clauses concerning maritime commerce. These clauses can be divided into four categories:

Some clauses grant power to the federal government. Examples of this type of clause include:

- "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction," Art. III, § 2 (Admiralty Clause)
- "The Congress shall have power . . ."
- "To provide for the common defense," Act. I, § 8 cl. 1
- "To regulate Commerce with foreign Nations, and among the several States," Art. I, § 8, cl. 3 (Commerce Clause)
- "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," Art. I, § 8, cl. 10
- "To declare War, grant Letters of Marque and Reprisal, and Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11
- "To provide and maintain a navy," Art. I, § 8, cl. 13
- "To make rules for the government and regulation of the land and naval forces," Art. I, § 8, cl. 14
- "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the Unites States, or in any Department or Officer thereof," Art. I, § 8, cl. 18

Some clauses restrict the power of the federal government. Examples of this type of clause include:

- "No tax or Duty shall be laid on Articles exported from any State," Art. I, § 9, cl. 5
- "No Preference shall be given by any regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obligated to enter, clear, or pay Duties in another," Art. I, § 9, cl. 6

Some clauses restrict the power of the state and local governments. Examples of this type of clause include:

- The Admiralty Clause Non-Delegation Doctrine, Art. III, § 2
- Negative Commerce Clause, Art. I, § 8, cl. 3
- "No State shall enter into any Treaty, Alliance, or Confederation," Art. I, § 10, cl. 1
- "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing it's inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress," Art. I, § 10, cl. 2
- "No State shall, without the Consent of the Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compacted with another State , or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay," Art. I, § 10, cl. 3

Finally, the Supremacy Clause makes all of this federal maritime and commerce law the supreme law of the land, overriding any state or local laws that might conflict.

- "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding," Art. VI, § 2

The federal focus on maritime issues did not end with the adoption of the Constitution but continued with the first Congress. One of the first acts was the Judiciary Act of 1789, which created the federal courts and included the "saving to suitors" clause which is still part of the admiralty law of the United States. The principal reason for creating the lower federal courts was the need for federal courts to exercise admiralty jurisdiction. The new government also needed a funding mechanism, and, again, the first Congress turned to maritime commerce. The Revenue Cutter Service of 1790 established what is now the Coast Guard to enforce the maritime tariffs that provided the funding source for the new nation.

The new Supreme Court also immediately turned to maritime law issues. The early Supreme Court addressed maritime issues such as insurance for vessels and cargo (*Wallace v. Child and Styles*, 1 U.S. 7 (1763)), the admiralty jurisdiction of the United States (*Montgomery v. Henry*, 1 U.S. 49 (1780)), and prizes taken at high sea (*Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. 95 (1784)).

The regulation of maritime matters by all three branches of the federal government has continued to this day, and it must continue into the future. As we saw mentioned earlier in this text, the reasons for giving power over maritime commerce to the federal government and removing it from the states, is even more compelling today. Most states today do not have direct outlets to the sea. Those non-coastal states must have as much say in how the maritime commerce system works as the coastal states do. Nebraska, South Dakota and Iowa can no more allow California to interfere with the flow of their grain to world markets than could Maryland allow Virginia to interfere with the flow of commerce to the Port of Baltimore back in the 1770s. Since the adoption of the Constitution, the regulation of maritime commerce has been exclusively a federal responsibility.

The loading and unloading of a vessel by MTOs and stevedores is a maritime activity and part of the federal regulatory responsibility to the exclusion of the states. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). Virtually every aspect of the work performed by NAWE members is regulated by federal, not state law. The industry's workers' compensation system is federal under the *Longshore and Harbor Workers' Compensation Act*, 33 U.S.C. §§ 901 *et seq*. (LHWCA). The industry's contracts for leasing land are federal contracts regulated by the Federal Maritime Commission (FMC) under *The Shipping Act of 1998*, 46 U.S.C. App. §§ 801 *et seq*. (*The Shipping Act*). The industry's customer contracts for loading and unloading vessels are federal contracts regulated by the FMC under *The Shipping Act*. The industry's tort liability for handling cargo is federal under the *Carriage of Goods by the Sea Act*, implementation codified at 46 U.S.C. §§ 1300, *et seq*. The industry's security is governed by federal law through the Maritime Transportation Security Act, 46 U.S.C. §§ 70101 *et seq*., and other federal laws.

The same federal admiralty/maritime jurisdiction that gave the federal government authority to regulate every aspect of the MTO/stevedoring industry also protected the industry from conflicting and inconsistent state laws. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). While it probably goes too far to say that states have no role when it comes to maritime commerce, it is safe to say that the role of states is minimal at best. Any state regulation of maritime activities is unconstitutional if it:

1. Discriminates against or burdens the maritime commerce of the United States (U.S. Constitution, Article I, Section 8, Clause 3. *Healey v. Beer Institute, Inc.,* 491 U.S. 324, (1989); Hughes *v. Oklahoma*, 441 U.S. 332 (1979)).
2. Works a material prejudice to any characteristic feature of the general maritime law of the United States or interferes with the harmony or uniformity of the maritime law of the United States (U.S. Constitution, Article III, Section 2, Clause 1. *Southern Pac. Co. v. Jensen*, (244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924)).
3. Lays imposts or duties on the maritime commerce of the United States in an amount that is not absolutely necessary for executing state inspection laws. (U.S. Constitution, Article I, Section 10, Clause 2).
4. Taxes the exports of any state (U.S. Constitution, Article I, Section 9, Clause 5).
5. Lays a duty on tonnage (U.S. Constitution, Article I, Section 10, Clause 3).
6. Imposes a tax or fee on the maritime commerce of the United States unless the tax or fee: (i) directly applies to activities with a substantial nexus to the state; (ii) is fairly apportioned between the maritime commerce of the United States and other entities in the state; (iii) does not discriminate against the maritime commerce of the United States when compared to other entities in the state; (iv) is fairly and directly related to the services provided by the state; (v) does not enhance the risk of multiple taxation of the maritime commerce of the United States; and (vi) does not impair federal uniformity in an area where federal uniformity is essential, unless such tax or fee has been expressly approved by Act of Congress. (U.S. Constitution Article I, Section 10, Clause 2. *Washington Rev. Dept. v. Stevedoring Assn.*, 435 U.S. 734 (1978); *Japan Line, LTD. v. County of Los Angeles*, 441 U.S. 434 (1979); *Oregon Waste Systems v. Environmental*, 511 U.S. 93 (1994)).

This list of constitutional restrictions that directly apply to state regulation of maritime commerce does not include a large number of other constitutional clauses that indirectly apply, e.g., due process, search and seizure and equal protection, and also does not include the countless number of additional statutory restrictions that may directly or indirectly restrict state authority.

There can be no doubt that Congress and the federal government have a constitutional obligation to protect maritime commerce from the interference of state and local governments. It is NAWE's position that the Congress has not done enough to fulfill its constitutional obligation to protect maritime commerce from state and local interference. It is interesting to contrast what this Committee has done for aviation versus maritime commerce. Aviation does not enjoy constitutional protection the way that maritime commerce does. However, when a state or local government takes any action that might interfere with aviation, Congress has established an administrative process for rapidly reviewing that state or local action. There is an officer of the United States, the FAA Administrator, who is responsible for ensuring that no state or local interference occurs. 49 U.S.C. § 40103 Sovereignty and Use of Airspace. No such federal official exists when it comes to maritime commerce.

NAWE respectfully requests that any revisions to *The Shipping Act* include the addition of a statutory provision similar to that contained in the *Federal Aviation Act*. At the very least, maritime commerce should be on the same footing as aviation commerce. NAWE looks forward to working with the Committee as it reviews the maritime commerce laws to further ensure that regulation of maritime commerce remains the exclusive domain of the federal government.

4 ANTITRUST IMMUNITY AND SOCIAL PROBLEMS

NAWE recognizes that this Committee will review the issue of antitrust immunity in light of the recent actions of the European Union. I have attached the NAWE submission to the Antitrust Modernization Commission, which reviews our position in great depth. Let me make a few points here. First, any review of the ocean common carrier immunity should be separate from that of MTOs. The environments in which carriers and MTOs operate are different. The Committee should note that its witnesses by and large are not calling for or addressing the antitrust immunity for MTOs. The legal and economic issues are different when it comes to carriers and MTOs and they must be considered separately.

Second, MTOs are increasingly being asked to solve public policy problems that are not directly within their control and do not lend themselves to market forces. An easy example is the move to truck traffic using night gates in LA/Long Beach. The public wanted more truck traffic to move at night to reduce congestion and pollution. MTOs have no direct contractual relationship with trucks and the customer demand was for the cargo to move during the day. If any MTO had acted unilaterally to force cargo to move at night, the marketplace would have shifted the cargo to a competitor. The only mechanism for moving the cargo to night gates was for all the MTOs to work together. Without the antitrust immunity in *The Shipping Act*, this change never would have occurred.

A second example is some of the cooperative efforts that MTOs have undertaken to improve security. Again, these efforts have involved sharing costs and imposing uniform obligations on the market place so that security is improved for all.

Again, NAWE looks forward to working with the Committee to address the issue of where antitrust immunity is appropriate in the maritime commerce system.

Mr. Chairman and members of the Committee, thank you for your kind attention.